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No. 92-1077

In The

Supreme Court of the United States

October Term, 1992

AMERICAN AIRLINES, INC.,

Petitioner,

v.

SCOTT DAVIES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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ISSUE PRESENTED IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Whether the United States Court of Appeals for the Tenth Circuit properly held that respondent's state law claim for termination in violation of public policy, based on petitioner's discharge for union organizing activity was not preempted by the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.*?

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SCOTT DAVIES,

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Scott Davies ("DAVIES") respectfully submits this Brief In Opposition to petitioner, American Airlines, Inc.'s ("AMERICAN"), Petition for Writ of Certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit.

JURISDICTIONAL ISSUE

Respondent received a copy of the Petition for Writ of Certiorari on December 28, 1992. This Brief In Opposition is timely filed under Rule 15.2 of the Rules of the Supreme Court of the United States.

STATEMENT OF THE CASE

DAVIES was employed by AMERICAN at its Tulsa, Oklahoma facility as an aircraft mechanic. As a condition of employment, DAVIES was required to be a member of the Transport Workers Union ("TWU"), party to a collective bargaining agreement ("CBA") with AMERICAN.

In 1989, DAVIES and other AMERICAN mechanics initiated a petition drive calling for an election to determine whether the Airline Mechanics Fraternal Association ("AMFA") should replace the TWU. AMFA would have represented only skilled crafts, in contrast to the TWU which represented both skilled and unskilled classes and crafts. Additionally, AMERICAN employees were dissatisfied with TWU representation.

DAVIES was elected chairman of the AMFA organizing committee. In that capacity, DAVIES, on AMFA's behalf, placed a debate notice in a local newspaper containing the words "AMERICAN AIRLINES". AMERICAN disciplined DAVIES alleging he "ma[de] false or slanderous statements about the Company . . . " (Petition For Writ of Certiorari ("Petition"), App. 22a).

When DAVIES refused to capitulate to AMERICAN's pressure and desist from AMFA activities, he was fired to

quell AMFA's organizing efforts. Thereafter AMFA organizing activity ceased.

DAVIES, represented by the TWU, the same union he sought to replace, arbitrated his discharge. The System Board of Adjustment upheld his discharge but neither addressed nor even considered whether DAVIES was fired for a pretextual reason. (Petition, App. 20a-39a).

DAVIES sued AMERICAN in the United States District Court for the Northern District of Oklahoma ("District Court") for violation of public policy as set forth in the RLA, § 152 *Third*, prohibiting carrier "interference, influence, or coercion . . . in any manner to prevent the designation by its employees as their representatives . . . " DAVIES also alleged violation of public policy as embodied in the RLA, § 152 *Fourth*, prohibiting a carrier "deny[ing] or question[ing] the right of its employees to join, organize, or assist in organizing the labor organization of their choice. . . . "

DAVIES' diversity claim was decided by a jury which awarded $81,000 in actual damages and $15,000 in punitive damages. Following trial, the District Court sustained AMERICAN's motion for judgment notwithstanding the verdict ("JNOV"). *Davies v. American Airlines, Inc.*, No. 89-C-881-P, slip op. (N.D. Okla. Sep. 28, 1991). (Petition, App. 15a-19a).

The Court of Appeals for the Tenth Circuit ("Court of Appeals") reversed, finding no CBA interpretation necessary and that DAVIES' claim was not a "minor dispute" within the RLA purview. *Davies v. American Airlines, Inc.*, 971 F.2d 463, 465-466 (10th Cir. 1992), *reh'g denied*, September 8, 1992 (*"Davies"*).

SUMMARY OF ARGUMENT

The Court of Appeals correctly determined that no CBA interpretation was necessary to adjudicate DAVIES' state law claim, protecting Oklahoma citizens against discharge in violation of clear mandates of public policy. Because no CBA interpretation was required, no "minor dispute" under the RLA was implicated, and the RLA did not preempt DAVIES' state law action.

The Court of Appeals also correctly determined that DAVIES' state law claim did not encroach on the RLA's purview. Additionally, the Court of Appeals was correct that DAVIES' employment status did not affect his action for violation of public policy and that arbitration did not preclude an Oklahoma remedy.

REASONS FOR DENYING THE WRIT

A. OKLAHOMA LAW PROTECTS CITIZENS FROM WRONGFUL DISCHARGE, A MATTER OF SIGNIFICANT STATE CONCERN.

DAVIES' diversity action does not, as AMERICAN asserts, circumvent the RLA. Oklahoma law provides a remedy unavailable under the RLA only when a discharge contravenes "a clear mandate of public policy." *Burk v. K-Mart Corp.*, 770 P.2d 24, 28 (Okla. 1989) (AMERICAN briefing as *amicus curiae*).

DAVIES' *Burk* claim sought redress for his discharge because of union organizing activity. *Davies*, at 464. DAVIES' discharge violated the RLA's "public policy," § 152 *Third* and *Fourth*, because his discharge was

designed to interfere with employees' selection of a representative. A *Burk* action augments RLA protection by deterring carrier discharges inimical to public policy. A *Burk* claim actually effectuates the RLA's public policy by providing Oklahoma employees a remedy when a discharge violates the RLA's clear principles. Because *Davies* correctly evaluated the issues and followed precedent, this Court's review is unwarranted.

Since *Burk*, "public policy" violations under Oklahoma law have been found in a variety of sources. *See e.g. Tate v. Browning-Ferris, Inc.*, 833 P.2d 1218, 1222 (Okla. 1992) (discharge for filing racial discrimination claim); *Sargent v. Central Nat. Bank & Trust Co.*, 809 P.2d 1298 (Okla. 1991) (discharge for refusing to alter audit report); *Todd v. Frank's Tong Service, Inc.*, 784 P.2d 47, 50 (Okla. 1989) (discharge for refusing to operate unsafe vehicle); *White v. American Airlines, Inc.*, 915 F.2d 1414, 1419 (10th Cir. 1990), *rev'd on other grounds* (retaliatory discharge for refusal to commit perjury); *Bishop v. Federal Intermediate Credit Bank*, 908 F.2d 662 (10th Cir. 1990) (retaliatory discharge for Congressional testimony).

This Court recognizes a state's substantial interest in its protecting citizens. *Cf. Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988) (state law protection is not preempted by 29 U.S.C. §§ 141 *et seq.* Labor-Management Relations Act ("LMRA") when CBA interpretation not required); *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 211-12 (1985) (same); *Farmer v. United Brotherhood of Carpenters & Joiners, Local 25*, 430 U.S. 290 (1977) (29 U.S.C. §§ 151-169, National Labor Relations Act ("NLRA") did not preempt union official's tort claim).

Davies relied on *Tate v. Browning-Ferris, Inc., infra,* in reversing the District Court. *Davies,* at 468. *Tate* rebutted arguments that DAVIES' sole remedy was through RLA procedures and that the mere presence of an inadequate federal regulatory scheme did not preclude a *Burk* action: "By statutory mandate *the common law remains in full force in this state, unless a statute explicitly provides to the contrary.*" "*Where the common law gives a remedy, and another is provided by statute, the latter is merely cumulative, unless the statute declares it to be exclusive.*" *Id.,* at 1225-1226 (citations omitted, emphasis in original).

AMERICAN has consistently failed to support its protestation of how the RLA's purpose of "avoid[ing] interruption of commerce" would be undermined by *Burk* actions. By definition, *Burk* applies to "a narrow class of cases in which the discharge is contrary to a clear mandate of public policy." *Burk,* at 28. Because *Burk*'s application is so tightly circumscribed, no interference with federal labor regulation can be established. Furthermore, Oklahoma's protection against wrongful discharge, coupled with *Burk's* limited application is of paramount importance to evaluate preemption claims.

B. THE RAILWAY LABOR ACT SHOULD NOT BE EXERCISED TO PREEMPT MINIMAL STATE LAW PROTECTION.

A "minor dispute" is one which "require[s] CBA interpretation. Because Davies' *Burk* action does not require CBA interpretation, it is not a "minor" dispute,

and accordingly it is not preempted from judicial resolution." *Davies*, at 468. *See also, Lingle*, at 413; *Atchison T.& S.F. Ry. Co. v. Buell*, 480 U.S. 557, 564-565 (1987).

"Minor disputes" involve rates of pay, rules, or working conditions. RLA, 45 U.S.C. § 153 *First* (i) (1970). "Minor disputes" are to enforce CBA terms and may be resolved by CBA interpretation. *Consolidated Rail Corp. v. Railway Labor Executives' Association*, 491 U.S. 299, 305 (1989).

The essence of AMERICAN's argument is that the mere existence of an employment relationship *ipso facto* confers RLA jurisdiction on *any* employment dispute. AMERICAN urges RLA preemption even when an employer's actionable conduct is unrelated to matters within CBA purview. Those broad preemption contentions have been rejected time and again. *Cf. Allis-Chalmers Corp. v. Lueck, supra; Farmer v. United Brotherhood of Carpenters & Joiners, Local 25, supra; Terminal Railroad Assoc. of St. Louis v. Brotherhood of Railroad Trainmen*, 318 U.S. 1 (1943).

The RLA does not divest courts of jurisdiction to decide actions based on violations of RLA principles. *See Price v. PSA, Inc.*, 829 F.2d 871, 876 (9th Cir. 1987), *cert. denied*, 486 U.S. 1006 (1988) (implied right of action exists under RLA, § 152 *Fourth*); *Arcamuzi v. Continental Air Lines, Inc.*, 819 F.2d 935, 936 (9th Cir. 1987) (same); *Pikop v. Burlington Northern R. Co.*, 390 N.W.2d 743 (Minn. 1986), *cert. denied*, 480 U.S. 951 (1987); *Roscello v. Southwest Airlines Co.*, 726 F.2d 217, 220 (5th Cir. 1984) (private action under RLA, § 152 *Fourth*); *Burke v. Campania Mexicana De Aviacion*, 433 F.2d 1031, 1033 (9th Cir. 1970) (same).

Price v. PSA, Inc., infra addressed similar factual and parallel legal claims and construed the breadth of RLA preemption:

> . . . Congress has not indicated, as it did with LMRA § 301 and ERISA, that the RLA is "so powerful as to displace entirely any state cause of action." Absent a direct expression of congressional intent to create federal jurisdiction for all causes of action within the scope of section 2, Fourth of the RLA, we believe we must abide by the well-pleaded complaint rule.

Id. at 876 (citations omitted).

The "well-pleaded complaint rule," looks only to the plaintiff's allegations rather than a defendant's anticipated defenses. *Oklahoma Tax Com'n v. Graham*, 489 U.S. 838, 840-41 (1989); *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 398-99 (1987). State jurisdiction cannot be obviated "on the basis of a federal defense, including the defense of pre-emption, even if the defense is anticipated in the plaintiff's complaint . . . " *Caterpillar*, at 393.

The heart of *Davies* is that no CBA interpretation was required, applying only Oklahoma law to the jury's factual inquiry. *Id.* at 468. Of utmost significance is, that when adjudicating "purely factual questions . . . and the conduct and motivation of the employer," stripped of AMERICAN's legal parlance, the jury found AMERICAN culpable and awarded punitive damages. *Cf. Lingle, supra*, at 407.

AMERICAN cites *Lorenz v. CSX Transportation, Inc.*, ___ F.2d ___, 141 LRRM 2921 (4th Cir. 1992) and *Grote v. Trans World Airlines*, 905 F.2d 1307 (9th Cir. 1990), *cert.*

denied, ___ U.S. ___, 111 S.Ct. 386 (1990), asserting a conflict of circuits. *Lorenz* noted that the plaintiff "challenges CSX's conduct in the application of the investigatory procedures required by the [CBA]." *Id.* at 2924. Likewise, the gravamen of *Grote* was that the wrongful discharge arose from a CBA based obligation to pass a health examination. *Grote*, at 1309. *Davies* is distinguishable because nothing in his discharge implicated *any* CBA provision, including a "just cause" term. *Id.* at 466.

As a state law matter, certiorari should be denied: "As to questions controlled by state law, . . . conflict among the circuits is not of itself a reason for granting a writ of certiorari. The conflict may be merely corollary to a permissible difference of opinion in the state courts." *Ruhlin v. New York Life Ins. Co.*, 304 U.S. 202, 206 (1938). When reviewing state law questions, this Court "ordinarily [] accept[s] and therefore do[es] not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts." *Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944).

Caterpillar, Inc. v. Williams, 482 U.S. 386 (1987), cogently rejected the same preemption argument AMERICAN advances:

> [I]ndividual employment contracts are not inevitably superseded by any subsequent collective agreement covering an individual employee, and claims based upon them may arise under state law. Caterpillar's basic error is its failure to recognize that a plaintiff covered by a collective-bargaining agreement is permitted to assert legal rights *independent* of that agreement, including state-law contract rights, so long as

> the contract relied upon is *not* a collective-bargaining agreement.

Id., at 396 (emphasis in original).

Atchison T.& S.F. Ry. Co. v. Buell, supra succinctly rejected a similar premise of RLA preemption: "It is inconceivable that Congress intended that a worker who suffered a disabling injury would be denied recovery under the [Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51 *et seq.*] simply because he might also be able to process a narrow labor grievance under the RLA to a successful conclusion." *Id.* at 565. It is just as inconceivable that Congress, through the RLA, intended to deprive aggrieved employees of minimal state protection afforded by *Burk*. Such a position would sanction wholesale public policy violations cloaked with protection of federal law.

Despite AMERICAN's legal ruminations, *Burk* was designed to prevent the very harm inflicted on DAVIES: "[T]he interests of the people of Oklahoma are not best served by a marketplace of cut-throat business dealings where the law of the jungle is thinly clad in contractual lace." *Id.* at 26, *quoting Hall v. Farmers Ins. Exchange*, 713 P.2d 1027, 1029 (Okla. 1985).

C. THE RLA NEITHER EXPLICITLY NOR IMPLICITLY PREEMPTS STATE PROTECTION.

Cipollone v. Liggett Group, Inc., ___ U.S. ___, 112 S.Ct. 2608 (1992) found that federal law should be construed against preemption of state police power, that Congressional enactments do not automatically pre-empt other

regulation, and looked to inherent conflict between federal and state regulations. *Id.* at 2618. *See also, English v. General Elec. Co.*, 496 U.S. 72, 79 (1990). Absent an "actual conflict," state law is not pre-empted. *Id.* at 90; *Tate v. Browning-Ferris, Inc., supra,* at 1222.

With *Burk's* "tightly circumscribed" application, the specter of interference with federal law advanced is illusory. *Only* when employers contravene public policy does *Burk* protect against reprisals as DAVIES suffered. Clearly, the RLA does not encompass every employment dispute. *See Brotherhood of Locomotive Engineers v. Baltimore & Ohio R.R. Co.*, 372 U.S. 284, 289-90 (1963); *Terminal Railroad Assoc. of St. Louis, supra,* at 6-7.

Under *Cipollone,* there is no conflict between the RLA and a *Burk* action. *Farmer, supra,* noted that when Congress did not provide "specific directions with respect to the scope of preempted state regulation," not all local regulation which concerns employment is preempted. *Farmer,* at 295-96.

Cipollone recognized that "state regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *Cipollone,* at 2620 *quoting San Diego Building Trades Council v. Garmon,* 359 U.S. 236, 247 (1959). Oklahoma's protection against "a marketplace of cut-throat business dealings" together with damage award deterrents, merely implement *Burk's* protection.

Davies correctly found no encroachment into the RLA's regulatory scheme. *Cf. Cipollone,* at 2618. *Accord,*

Atchison T.& S.F. Ry. Co. v. Buell, supra at 566-567 (FELA emotional injury action would not wreak havoc with RLA; absent an intolerable conflict, RLA does not repeal any part of the FELA).

Courts frequently rely on other labor enactments in construing RLA application. *Cf. Brotherhood of Ry. Trainmen v. Terminal Co.*, 394 U.S. 369 (1969) (NLRA used to construe RLA); *International Ass'n of Machinists v. Central Airlines, Inc.*, 372 U.S. 682, 692 (1963) (same), *Roscello v. Southwest Airlines Co., supra*, at 222 (same).

AMERICAN argues that the LMRA, upon which *Lingle* was decided, should not apply to RLA cases (Petition, at 8). However, the pervasive RLA preemption to which AMERICAN alludes refers to the NLRA's original regulatory scheme dating to the Wagner Act, as administered by the National Labor Relations Board. Now, the entire NLRA includes the Taft-Hartley Act of 1947 amendments, 29 U.S.C. § 185, Section 301, embodied in the NLRA and enforced by the National Labor Relations Board. Most CBAs include exclusive grievance and arbitration provisions, exactly paralleling the RLA's arbitration remedy. *Cf. Allis-Chalmers Corp v. Lueck, supra*, at 220. Also, this Court very recently declined to review the propriety of *Lingle*'s preemption test in RLA cases. *O'Brien v. Consolidated Rail Corp.*, 972 F.2d 1 (1st Cir. 1992) *cert. denied*, ___ U.S. ___, 61 U.S.L.W. 3478 (No. 92-870, Jan. 11, 1993).

D. THE EMPLOYMENT STATUS OF A RETALIATORY DISCHARGE VICTIM IS IMMATERIAL WHEN ADJUDICATING STATE PROTECTION.

Both AMERICAN and District Court reliance on "at-will" status was "essentially a variant of . . . *Burk* [being] unavailable where a discharged employee has an alternate remedy." *Davies*, at 469. *Davies* recognized that "[w]hen an employer discharges an employee in violation of such a public policy, society is equally aggrieved whether the employee is "at-will" or can be discharged only for "just cause[]" and "parties to a contract may not incorporate in it rights and obligations which are clearly injurious to the public." *Id.*, at 469 (citations omitted). *See also, Southwest Forest Industries v. Sutton*, 868 F.2d 352, 355 (10th Cir. 1989) (it is a "disturbing proposition" that union employees must surrender tort remedies not considered in collective bargaining).

Commodore v. University Mechanical Contr., 839 P.2d 314, 318-319 (Wash. 1992), a state law tort action rejecting LMRA, § 301 preemption similarly rejected defendant's "just cause" defense:

> In passing section 301, Congress did not intend to give union workers fewer rights than non-union workers. If an employer could eliminate a union member's right to bring a state law action simply by asserting a defense requiring CBA interpretation, employees would see unionization as a less desirable alternative.

Id., quoting Note, *The Need for a New Approach to Federal Preemption of Union Members' State Law Claims*, 99 Yale L.J. 209, 229 (1989) (footnote omitted).

Tate v. Browning-Ferris, Inc., supra, relied on *Alexander v. Gardner-Denver Co.,* 415 U.S. 36 (1974), noting that the Civil Rights Act, Title VII, 42 U.S.C. § 2000e *et seq.* ("Title VII") allowed "multiple enforcement fora." *Tate,* at 1222-1223, n. 13. *Tate* found Title VII protection a "floor beneath which federally provided protection may not drop." *Id.,* at 1222. Similarly, *Davies* held that *Burk* was to protect society by carrying out public policy. *Davies,* at 469.

E. ARBITRATION WHICH OMITS CONSIDERATION OF A PRETEXTUAL DISCHARGE AFFORDS NO REMEDY FOR WRONGFUL TERMINATION AND CANNOT PRECLUDE MINIMAL STATE REMEDIES.

Claiming Adjustment Board appeal was DAVIES' sole remedy, AMERICAN omits that the arbitration award did not consider a pretextual discharge. (Petition, App. 20a-39a). It defies credulity to suggest that arbitration provides a "remedy" while overlooking the employer's true motivation. Adjustment Board appeal is absurd when AMERICAN's underlying motive could not be examined.

The Court of Appeals acknowledged that arbitrators may lack expertise to adjudicate questions of law rather than interpreting a CBA. *Davies,* at 467. *Accord, Barrentine v. Arkansas-Best Freight System,* 450 U.S. 728, 743 (1981) (arbitration forum inadequate to enforce minimum wage statutes); *Alexander v. Gardner-Denver Co., supra* at 53 (arbitrators lack authority to invoke public laws); *Southwest Forest Industries v. Sutton, supra,* at 355 (arbitration

remedies inadequate when discharge contravenes public policy).

AMERICAN's exclusive remedy claims also ignore that DAVIES would be represented by the TWU, the same union he sought to replace. *Cf. Glover v. St.Louis-San Francisco Railway Co.*, 393 U.S. 324, 330 (1969) (Adjustment Board submission not mandatory when remedy is wholly futile or must be submitted to group against whom complaint is made). *See also, Barrentine, supra,* at 742 (union may sacrifice individual's rights to those of entire bargaining unit).

AMERICAN's claim that employees "try out" arbitration deliberately disregards that an arbitrator's expertise is in the law of the shop rather than the law of the land. An arbitral "remedy" failing to consider pretextual reasons cannot be regarded as a remedy at all. Analysis of state-law and contractual considerations premised on the same facts is consonant with this Court's rulings. *Lingle, supra,* at 408; *Davies,* at 466.

CONCLUSION

There are no issues which justify granting *certiorari*. The Court of Appeals correctly found that DAVIES' state law action was not preempted by the RLA. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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